Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 07-29
	)	
Development of Competition and Diversity In Video Programming Distribution: Section 628(c)(5) of the Communications Act:	)	
	)	
Sunset of Exclusive Contract Prohibition	)	
	)	
Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements	)	MB Docket No. 07-198

REPLY COMMENTS OF CABLEVISION SYSTEMS CORP.

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Cablevision Systems Corp. ("Cablevision") hereby submits these reply comments in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

Telephone company commenters offer no sound basis for rejecting a proposal to allow cable operators to petition for elimination of the program access rules' exclusivity ban in specific local markets where a granular analysis of market conditions shows durable competition from both DBS and either AT&T or Verizon. Establishing a process that enables cable operators to show that competitive conditions in a particular local market obviate any possible justification for forced sharing arrangements in that market does no more than furnish cable operators the same opportunity afforded to the telephone companies with respect to their unbundling obligations.

Suggestions by telephone companies that Verizon and AT&T are still too small to weather the possibility of relief from the exclusivity ban in competitive local markets are disingenuous. Both companies' wireline network footprints are far larger than that of any cable company, and Verizon already has surpassed one million cable subscribers (and AT&T expects to do the same in 2008), thereby making it one of the ten largest multiple system operators ("MSOs") in the country. Further, since cable exclusivity arrangements in local markets where the *per se* exclusivity ban is lifted due to competition could still be challenged under the "unfair competition" prong of the program access rules, the proposal carries no risk of fostering competitive harm. Limiting the *per se* exclusivity ban to markets where it is a competitive necessity would more closely effectuate the statutory standard set forth in section 628(c) of the Act and further the objectives of the Cable Act by allowing market forces and consumer preferences, rather than government regulation, to shape competition among multichannel video programming distributors ("MVPDs").

Recycling a slew of shopworn arguments previously rejected on multiple occasions, the telephone companies urge the Commission to unlawfully expand the scope of program access to include terrestrial programming generally or terrestrially-delivered HD programming in particular. The Commission long ago concluded that section 628 is limited to satellite cable programming, and that terrestrially-delivered programming -- including terrestrially-delivered HD signals -- are beyond the scope of the program access rules. There is no legal basis for reversing this position, nor is there any factual basis for doing so. The terrestrial exemption has not precluded Verizon and AT&T from entering the video marketplace and investing tens of billions of dollars to deploy video-capable broadband infrastructure.

I. THE COMMISSION SHOULD ALLOW CABLE OPERATORS TO SEEK RELIEF FROM THE EXCLUSIVITY BAN IN COMPETITIVE LOCAL MARKETS

The proposal to allow cable operators an opportunity to demonstrate that the exclusivity ban is no longer necessary in certain local markets due to the emergence of durable competition from DBS and either AT&T or Verizon is consistent with the Commission's long-standing policy to reduce regulatory intervention in markets where competition has developed.[1/] In connection with Commission regulation of their core business, the telephone companies have vigorously advocated elimination of forced sharing arrangements in markets where they face competition.[2/]

[1/] *See, e.g., Local Competition and Broadband Reporting*, Notice of Proposed Rulemaking, 14 FCC Rcd 18100, 18102, ¶ 3 (1999) (noting the importance of "timely and reliable information about developing local competition and broadband deployment in order to avoid 'one size fits all' regulation of incumbent local carriers and others, and, specifically, in order to reduce regulation wherever we can" pursuant to forbearance authority); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Fifth Report and Order and Notice of Proposed Rulemaking, 15 FCC 3696, 3701, ¶ 7 (1999) ("[U]nbundling rules that are based on a preference for development of facilities-based competition in the long run will provide incentives for both incumbents and competitors to invest and innovate, and should allow the Commission to reduce regulation once true facilities-based competition develops."); *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Fifth Report and Order and Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14257, ¶ 67 (1999) ("[T]he Commission adopted a market-based approach to access charge reform, pursuant to which it would relax restrictions on incumbent LEC pricing as competition emerges, thereby ensuring that 'our own regulations do not unduly interfere with the development and operation of these markets as competition develops.'"); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 16304, 16311, ¶ 14 (2007) (noting prior grant of relief from unbundling obligations in local wire centers when Commission "found that the level of facilities-based competition . . . ensured that market forces would protect the interests of consumers and that such regulation, therefore, was unnecessary").

[2/] *See, e.g.*, Reply Comments of SBC Inc., *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket 04-223 (filed Sept. 4, 2004) at 9-10 ("[O]nce facilities-based retail competition has taken hold in a definable geographic market . . . continued [enforcement of the unbundling obligation] will cause serious harm by distorting the market through asymmetric regulatory burdens."); Comments of Verizon, *Unbundled Access to Network Elements*, WC Docket 04-313 (filed Oct. 4, 2004) at 7-8 ("[T]he Commission must make a finding of

In this proceeding, however, the telephone companies uniformly urge the Commission to deny cable operators the chance to obtain relief from the exclusivity ban in competitive local markets. Their position is particularly ironic since, as NCTA points out, "the Commission allows incumbent LECs to petition for forbearance from wholesale obligations," and the local market proposal raised in the *Notice* would do nothing more than provide cable operators "the same opportunity with respect" to the exclusivity ban.[3/] In considering the merits of market-by-market relief from asset-sharing obligations imposed on the telephone companies, the Commission has held that "it could be appropriate to conclude, based on sufficient facilities-based competition, particularly from cable companies, that the state of local competition might justify forbearance from unbundling obligations."[4/] Such a conclusion is equally true with respect to asset-sharing obligations applicable to cable operators.[5/]

The arguments offered in opposition to establishing a mechanism to eliminate the exclusivity ban in competitive local markets are without merit. Verizon objects to a market-by-market sunset, stating that new entrants must acquire a "critical mass" of subscribers across their entire video platform in order to obtain programming on reasonable terms. It maintains that "a market-by-market approach . . . would make it substantially more difficult for a new entrant to

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impairment with respect to particular geographic markets and market segments before it imposes a UNE obligation in each such market.").

3/ NCTA Comments at 12.

4/ *Petition of ACS of Anchorage, Inc., Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 1958, 1960, ¶ 5 (2007).

5/ *Cf. Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, 2535, ¶ 2 (2004) (noting benefits of using "unbundling authority in a more targeted manner").

reach this critical mass" because it would "stand to lose customers due to the incumbent cable operator's ability" to offer affiliated programming on an exclusive basis.[6]

That Verizon might "stand to lose customers" from cable exclusive arrangements provides no basis for unnecessarily prolonging the exclusivity ban in competitive local markets. In making the ban temporary, Congress clearly anticipated a point in which cable operators would again be allowed to employ exclusive arrangements to win and retain customers, thereby subjecting MVPDs to potential subscriber losses. Had Congress sought to permanently insulate Verizon and non-cable MVPDs from this prospect, it would not have directed the Commission to sunset the ban once competition had taken hold in the video marketplace. The exclusivity ban, however, constituted a suspension of the normal rules of the marketplace in which in which rival firms are free to compete on the basis of exclusive content and services, and the sunset enacted by Congress made clear that this departure would be temporary. Once competition had taken root, Congress expected competing MVPDs to respond to cable exclusivity not by seeking government relief, but by competing harder to retain their customers through lower prices, new investment, and innovation -- precisely the type of counter-measures employed every day by competitors in all segments of the economy in response to exclusive arrangements.

Verizon's suggestion that it has yet to obtain the critical mass of subscribers needed "to obtain programming on reasonable terms" is unavailing.[7] Verizon recently reported that it had passed 1 million cable subscribers, which would rank it as one of the ten largest cable MSOs in the country.[8] Indeed, Verizon already has a larger subscriber base than the vast majority of

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[6] Verizon Comments at 17.

[7] *Id.*

[8] *See Verizon Heads Toward Top 10*, MULTICHANNEL NEWS, Feb. 4, 2008, http://www.multichannel.com/article/CA6528274.html. AT&T expects its U-Verse video offering to reach the one million subscriber mark by the end of this year. *See AT&T Reports $3.1B in 4Q Earnings*,

cable operators in the country, some of whom have been purchasing programming and operating successfully for decades. There is little merit to the suggestion that the exclusivity ban needs to be prolonged in competitive local markets because Verizon has yet to attain a sufficiently large subscriber base to obtain programming on reasonable terms.

Ignoring the Congressional decision to make the exclusivity ban temporary, some telephone company commenters offer arguments against a local market competition test that prove far too much. For example, OPASTCO suggests that it is simply too hard to arrive at "a clear understanding of what would constitute sustainable and sufficient competition."[9/] But that would mean that the exclusivity ban could never sunset, an outcome already prohibited by Congress. In a similar vein, CA2C adopts the unusual view that the exclusivity ban is most needed in those markets where cable faces competition from both DBS and the telcos.[10/] This approach would flip the statutory framework on its head, by cementing the exclusivity ban in those markets where levels of video competition are increasing. Congress, however, already has made clear that increased competition should decrease or eliminate the need for the exclusivity prohibition.

Other telephone company commenters echo Verizon's suggestion that a local market competition test would be undesirable due to the "national leverage" of the large cable MSOs.[11/] Of course, no cable operator in its core business comes close to achieving the size and scope of

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ASSOCIATED PRESS, Jan. 24, 2008, *available at* http://biz.yahoo.com/ap/080124/earns_at_t.html ("U-Verse . . . should exceed 1 million by the end of the year, the company said.").

9/ OPASTCO Comments at 3.

10/ CA2C Comments at 22-23.

11/ USTA Comments at 15 (saying that market-by-market analysis of video competition "fails to account for the realities of the programming market, and incumbent cable's national market leverage").

either Verizon or AT&T in wireline telephony.[12/] Yet both those companies -- as well as the Commission -- supported the establishment of a local market test for removing unbundling obligations imposed upon incumbent local exchange carriers. The Commission should ignore this plea for asymmetrical regulation and provide cable companies the same type of opportunity to seek relief from forced sharing arrangements in competitive local markets that was afforded the telephone companies years ago.

The argument that the "national leverage" of vertically-integrated cable companies compels rejection of a local market competition test rings particularly hollow with respect to Cablevision, since the company serves fewer than 5% of the nation's 110.2 million television households. There is no basis for concluding that such a small market footprint could somehow create "national leverage" that could thwart the continued emergence of the telephone companies as substantial players in the video services market. To the contrary, the Commission has recognized that the smaller a cable operator's footprint, the less likelihood there is that that operator could use exclusivity to harm competition.[13/] Even assuming *arguendo* that there might be some cable operators that should be precluded from seeking local market relief from the exclusivity ban because their size and scope provide them with "national leverage" -- which is

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12/ *Compare* VERIZON COMMUNICATIONS 2006 ANNUAL REPORT, at 4, http://investor.verizon.com/financial/annual/2006/download.html (reporting Verizon as serving 45 million wireline access lines) *and* 2006 ANNUAL REPORT, AT&T, INC., at 24, http://www.att.com/Investor/ATT_Annual/downloads.html (reporting AT&T as serving over 46 million wireline access lines) *with* National Cable and Telecommunications Association, *Top 25 MSOs - As of September 2007*, http://www.ncta.com/Statistic/Statistic/Top25MSOs.aspx (reporting Comcast Cable Communications (24.2 million subscribers), Time Warner Cable (13.4 million subscribers) and Cox Communications (5.4 million subscribers) as the three largest cable system operators).

13/ *See, e.g., Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, MB Docket No. 07-29, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd. 17791, ¶ 60 (2007) ("*2007 Extension Order & NPRM*") (noting that the need for the exclusivity ban diminishes as "competition in the MVPD market continues to develop and cable market share continues to decline").

not the case, particularly in relation to the telephone companies and the national footprint of the DBS providers -- Cablevision is simply too small to be included in that group.

There is no sound basis for concluding that relief from the exclusivity ban in competitive local markets must be deferred until there is greater competition on a national basis. The ILECs were arguing for elimination of asset-sharing mandates in some local markets at a time when their voice competitors held no more than 15 percent of the residential telephony market nationally.[14/] By contrast, non-cable MVPDs today serve more than twice that proportion of multichannel households.[15/] If anything, the much higher level of national market share held by cable's competitors provides greater justification for affording cable operators market-by-market relief from asset-sharing obligations imposed than was present when such an opportunity was accorded to the telephone companies.

Most importantly, the "national leverage" argument is predicated upon the fundamentally flawed notion that the telephone companies' presence in the local markets which they have entered is somehow fragile or tenuous. This is simply incorrect. AT&T and Verizon each have expended billions of dollars in sunk costs upgrading their network infrastructure to provide video. Verizon has made clear that it is fully committed to the video business for the long-

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14/ *See* SBC, Inc., *supra* n.2; Verizon, *supra* n.2; News Release, Federal Communications Commission, Federal Communications Commission Releases Data on Local Telephone Competition, at 1 (Dec. 22, 2004) (noting that CLECs served 15% of residential and small business users). *See also Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172 (filed Sept. 6, 2006); News Release, Federal Communications Commission, Federal Communications Commission Releases Data on Local Telephone Competition, at 1 (Jan. 31, 2007) (noting that as of June 30, 2006, CLECs served 17% of all end-user lines and 12.4% of all residential lines).

15/ News Release, Federal Communications Commission, FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report, at 3 (Nov. 27, 2007) (noting that competing MVPDs serve approximately 32% of all MVPD subscribers).

haul,[16/] serving hundreds of communities in a dozen states, entering into franchise agreements that typically have terms of at least ten years, and securing distribution rights to over 400 channels of programming and 10,000 on-demand titles in a relatively short time frame.[17/] AT&T also has moved aggressively to entrench itself in the video distribution business, spending $4.6 billion to upgrade its network and obtaining distribution rights to more than 300 channels of video programming. In its most recent quarter, the number of U-Verse subscribers served by AT&T more than doubled, and the company reported that install rates were nearing 10,000 per week toward the close of the quarter.[18/] AT&T has stated that its "goal is to have the biggest video footprint of any of our competitors in 22 states."[19/]

As Comcast points out, "Congress believed the resources of the telcos were so certain to ensure effective competition that it instructed the Commission to find that effective competition exists whenever an incumbent local exchange carrier is providing video services in a market," irrespective of the specific number of homes passed or the level of video penetration achieved.[20/] Verizon and AT&T have network footprints, market reach, and financial resources of unmatched

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16/ *See, e.g., Verizon's Seidenberg: It's All About the Network*, ONLINE REPORTER, June 26, 2007; *New round begins in fight over choice*, BERGEN COUNTY RECORD, Jan. 15, 2007 (reporting Verizon statements that the company "will sell TV in approximately 300 New Jersey communities" in 2007 and quoting a Verizon official as saying "In two months we'll be serving more towns in New Jersey than Cablevision has in 35 years.").

17/ *See* Press Release, Verizon, More New Yorkers Gain TV Choice As Verizon Expands FiOS TV in Two More Communities, Nov. 12, 2007; Press Release, Verizon, Choice and Competition for TV Service on the Way to More Rhode Island Consumers, Mar. 8, 2007; *Crash Course to Success: Verizon's O'Connell Defies FiOS Odds*, MULTICHANNEL NEWS, Jan. 29, 2007 ("Terry Denson, vice president of programming and marketing for FiOS TV . . . managed to get 300 channels under contract in a year."); *A new player in TV; can Verizon flip the switch?*, CRAIN'S NEW YORK BUSINESS, Nov. 27, 2006 ("'A typical deal for multichannel distribution takes 12 to 18 months to close,' says Mr. Denson, vice president of content strategy and acquisition for FiOS TV. 'We were asked to do over 100 deals in half that time.'").

18/ Press Release, AT&T, AT&T Delivers Strong Third-Quarter Results; Growth Highlighted by Robust Wireless Gains, Advances in Enterprise Services, Accelerated TV Ramp (Oct. 23, 2007).

19/ *See TV Dominates a Telco Stage*, BROADCASTING & CABLE, June 25, 2007.

size and strength. The amount of capital they have already invested in the video business and their pre-existing relationships with a combined 70 million households ensures that both AT&T and Verizon have the resources and durability to compete effectively in any local market that they enter. Under these circumstances, there is no basis for denying cable operators the opportunity to demonstrate on a market-by-market basis that the presence of durable competition from DBS and either AT&T or Verizon obviates continued imposition of the exclusivity ban in particular local areas.[21/]

II. THE FCC LACKS AUTHORITY TO EXTEND THE PROGRAM ACCESS RULES TO PROGRAMMING THAT IS NOT SATELLITE-DELIVERED

A. The Commission Is Prohibited By Statute From Subjecting Terrestrially-Delivered Programming To The Constraints Of Section 628.

Apparently unmindful of the numerous instances in which application of the program access rules to terrestrial programming has been considered and rejected,[22/] telephone company commenters, along with DirecTV, uniformly urge the Commission to extend the reach of section 628 beyond the limits expressly delineated by Congress.[23/] The Commission itself reiterated in

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20/ *See* Comcast Comments at 14-15.

21/ There is no merit to the suggestion that a "market-by-market approach would create procedural difficulties" in terms of structuring programming contracts to accommodate exclusive arrangements. *See* Verizon Comments at 17; OPASTCO Comments at 3 ("From a practical standpoint, this approach would be administratively difficult."). Cable programming networks that are unaffiliated with cable operators or terrestrially-delivered are not subject to any restrictions on exclusivity, and there has been no hint of any procedural or practical difficulties in licensing those services. Likewise, for decades, syndicated and non-network television program distributors have licensed their content on an exclusive basis through a market-by-market approach. The marketplace is fully capable of addressing and resolving any procedural or practical issues that arise in connection with allowing exclusive arrangements in competitive local markets.

22/ *See* Cablevision Comments at 14-15 & n.36.

23/ Verizon notes that Cablevision's programming affiliate, Rainbow Media, "refused to provide access to regional sports networks in the New York City area and New England," and that this dispute somehow highlights the need to extend the program access rules to terrestrial services. *See* Verizon Comments at 6. In fact, Verizon is actually distributing MSG, FSNY, and FSNE to its subscribers pursuant to a license agreement with Rainbow that was signed in 2006.

the *Notice* that "the plain language of Section 628(b), like Section 628(c)(2)(B)" expressly limits both the program access rules' unfair practices provision and the exclusivity ban to satellite-delivered programming.[24/]

AT&T's suggestion that the exclusion of terrestrial programming from the reach of section 628 simply reflects the fact that satellite delivery was the prevalent mode of program distribution in 1992 -- and therefore does not constitute a jurisdictional limit -- is wrong as both a matter of fact and law.[25/] As the Commission itself has noted: "[T]he legislative history of Section 628 . . . indicates that the version of the program access provision that the Senate adopted would have extended to terrestrially-delivered programming services but the House bill, that was eventually adopted, did not. This indicates a specific intention to limit the scope of the provision to satellite services."[26/] Even if there were no legislative history demonstrating that Congress deliberately restricted the scope of section 628 to satellite-delivered services, AT&T's position is still incorrect as a matter of law because the Commission has no authority to disregard plain language that expressly limits the reach of the statute.[27/]

24/ *2007 Extension Order & NPRM* ¶ 116.

25/ AT&T Comments at 5 ("While the terms of section 628 thus *require* the Commission to address the problem in the context of 'satellite cable or broadcast programming,' they do not foreclose it from addressing the same problem in the terrestrial context. The language used in Section 628 thus simply reflects Congress's understanding about the nature of the delivery mechanism typically used by cable programmers at the time of its enactment"). *See also* Verizon Comments at 12 ("[T]he distinction suggested by Section 628 between programming that is 'satellite' delivered and programming that is terrestrially delivered has largely gone away.").

26/ *EchoStar Communications Corp. v. Comcast Corporation*, Memorandum Opinion and Order, 14 FCC Rcd. 2089, 2099, ¶ 21 (1999) ("*EchoStar 1999 Order*").

27/ *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374-75 (1986) (The Commission "may not confer power upon itself . . . to expand its power in the face of a congressional limitation on its jurisdiction."); *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed."); *Browder v. United States*, 312 U.S. 335, 338 (1941) (holding that no argument has more weight in statutory interpretation than that a construction is within the plain meaning of the words of the statute).

Virtually all of the telephone company commenters express the view that application of the program access rules to terrestrial programming can be readily accomplished via the section 628(b) unfair practices provision.[28/] The Commission, however, has rejected that very argument: "'a practice permitted under the Communications Act and the Commission's rules cannot, without more, form the basis of a claim of unfair competition'" under section 628(b).[29/] The telephone companies uniformly point to the Commission's decision to use section 628(b) as the predicate for its *MDU Order*.[30/] That avenue, however, is unavailable here because the Commission already has determined in the context of deciding whether to apply the program access rules to terrestrial programming that section 628(b) cannot be used as a mechanism to "preclude cable operators from exercising competitive choices that Congress deemed legitimate."[31/] Likewise, as NCTA points out, neither sections 4(i) nor 303(r) of the Commission's rules offer any basis for extending section 628 to terrestrial programming, since courts have ruled that those provisions do not offer the Commission independent authority to regulate beyond the scope of express statutory limitations established by Congress.[32/]

The Broadband Service Providers Association argues that the Commission has authority to extend program access to terrestrial services under section 201's general grant of authority to

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28/ *See, e.g.*, Broadband Service Providers Association Comments at 3; Coalition for Competitive Access to Content Comments at 4, 12-18 (Coalition members include AT&T, Embarq, and OPASTCO); National Telecommunications Cooperative Association Comments at 8-9; USTA Comments at 8-9.

29/ *Dakota Telecom Inc. v. CBS Broadcasting, Inc. d/b/a Midwest SportsChannel and Bresnan Communications*, Memorandum Opinion and Order, 14 FCC Rcd 10500, 10507, ¶ 21 (1999) (quoting *American Cable Co. v. Telecable of Columbus, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 10090, 10117. ¶ 61 (1996)). *See also RCN Telecom Services of New York, Inc. v. Cablevision Systems Corporation*, Memorandum Opinion and Order, 14 FCC Rcd 17093, 17105, ¶ 25 (1999) (finding that permitted practices cannot be "unfair or deceptive").

30/ *See, e.g.*, AT&T Comments at 5; Verizon Comments at 9, 13; C2AC Comments at 13-14.

31/ *EchoStar Communications Corp. v. Comcast Corporation*, Memorandum Opinion and Order, 14 FCC Rcd. 2089, 2103, ¶ 29 (1999).

32/ NCTA Comments at 13.

"prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."[33/] This argument must fail. Section 201(b) is part of the separate title of the Communications Act governing communications common carriers, and it provides no basis for regulating cable operators' distribution practices. To the contrary, the Communications Act specifically forbids the Commission from using its common carrier authority to regulate cable systems.[34/] Section 201(b), therefore, cannot serve to extend the Commission's program access authority.[35/]

It is ironic that the telephone companies all urge the Commission to use section 706 of the 1996 Telecommunications Act to extend the program access rules to terrestrial services, arguing that such a step would promote broadband deployment. For years, they implored the Commission that dismantling regulations imposed upon local exchange carriers was an essential prerequisite to their meaningful deployment of broadband network infrastructure.[36/] In this proceeding, however, they attempt to argue that further broadband deployment necessitates expanded regulation of cable operators.[37/] As Cablevision noted in its initial comments, this is simply untenable as a factual matter, since AT&T and Verizon already have invested billions of

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33/ Broadband Service Providers Association Comments at 7, quoting 47 U.S.C. § 201(b).

34/ *See* 47 U.S.C. § 541(c) ("Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.").

35/ *See* NCTA Comments at 13. *See also* Cablevision Comments at 15 & nn.39-41; Comcast Comments at 9-10.

36/ *See, e.g., Petition of the Bellsouth Telecommunications, Inc. for Forbearance under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Title II Common-Carriage Requirements*, WC Docket No. 04-405, Petition for Forbearance, at 6 (filed Oct. 27, 2004) ("[T]he current rules harm consumers by imposing unnecessary costs and inhibiting broadband innovation and deployment."); *Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 04-440, Petition of the Verizon Telephone Companies for Forbearance, at 3 (filed Dec. 20, 2004) ("[A]pplying these [Title II] regulations to broadband would affirmatively harm consumers by preventing more effective competition and hindering increased deployment of broadband services.").

37/ *See, e.g.,* AT&T Comments at 13; OPASTCO Comments at 6.

dollars in order to deploy broadband network infrastructure to nearly 50 million homes under a regulatory framework that does not guarantee them access to terrestrial programming.[38/] Further, as the Commission itself has recognized, section 706 "does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods."[39/] It simply "directs the Commission to use the authority *granted in other provisions* . . . to encourage the deployment of advanced services,"[40/] but only in response to a finding that broadband deployment is not occurring in a reasonable and timely manner -- a finding the Commission expressly has declined to make in each of its section 706 reports.[41/]

DIRECTV provides the most expedient reading of the program access provisions offered by any commenter. On the one hand, it argues that section 628 cannot be "expand[ed]" to encompass DBS-affiliated programming because the statutory language is limited to cable-affiliated programming.[42/] On the other hand, just a few pages later, DIRECTV argues that section 628 can readily be expanded to cover terrestrial programming, even though the statutory language is limited to satellite-delivered programming.[43/]

38/ Cablevision Comments at 16.

39/ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 24011, 26044, ¶ 69 (1998).

40/ *Id.* at 24045, ¶ 69 (emphasis added).

41/ *See, e.g.*, Federal Communications Commission, AVAILABILITY OF ADVANCED TELECOMMUNICATIONS CAPABILITY IN THE UNITED STATES, FOURTH REPORT TO CONGRESS, at 38 (Sept. 9, 2004), *available at* http://www.fcc.gov/broadband/706.html ("Based on our analysis, we conclude that the deployment of advanced telecommunications capability to all Americans is reasonable and timely . . . .").

42/ DIRECTV Comments at 3-5.

43/ *Id.* at 9-11.

DIRECTV's suggestion that lack of access to terrestrial programming has the "effect" of hindering its delivery of satellite cable programming is equally without merit.[44/] Both DIRECTV and EchoStar have been without guaranteed access to terrestrial programming from their inception as MVPDs, and yet DBS subscribership has quintupled in the last decade and each DBS provider now has at least double the number of subscribers of nearly every cable MSO in the country.[45/] Even in Philadelphia, the market most often cited as evincing the problems associated with excluding terrestrial programming from the ambit of section 628, DBS market share has tripled since the issue of access to Comcast SportsNet was first raised.[46/] Further, DBS penetration in Philadelphia is comparable to that in at least a half-dozen similar metropolitan markets where DBS providers have raised no issues regarding access to regional sports networks.[47/]

B. There Is No Authority For The Commission To Extend The Program Access Rules To Terrestrially-Delivered HD Programming.

In its comments, Verizon asks the Commission to force cable operators to provide competitors with access to terrestrially-delivered HD feeds of programming "otherwise subject

44/ *Id.* at 11-13.

45/ *Compare Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fourth Annual Report, 13 FCC Rcd 1034, Table E-1 (estimating DBS national penetration in 1996 as 5.92% of MVPD subscribers) (1998) *with* News Release, Federal Communications Commission, FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report, (rel. Nov. 27, 2007) (estimating DBS penetration as 29% of MVPD subscribers as of mid-2006).

46/ *See Reconsidering Our Communications Laws: Ensuring Competition and Innovation: Hearing Before the S. Comm. On Judiciary*, 109th Cong. (2006), *available at* http://judiciary.senate.gov/testimony.cfm?id=1937&wit_id=5417 (testimony of David L. Cohen, Comcast Corporation).

47/ *See id.* Nor is cable penetration in Philadelphia appreciably higher than other DMAs where there are no reports of RSN access concerns for DBS. BROADCASTING & CABLE YEARBOOK C-14 (2007) (reporting that Philadelphia's cable penetration is 82%, which is lower than Boston, Providence, Hartford and comparable to New York).

to the program access rules."[48] As a threshold matter, Verizon's proposal rests upon its invention of a class of programming that is not cognizable under section 628 -- *i.e.*, programming "otherwise subject to program access." There is no such category of programming in the statute. Rather, programming either is or is not subject to section 628 because it is both (i) affiliated with a cable operator and (ii) delivered by satellite. Section 628 simply does not recognize the in-between category of programming posited by Verizon.

As detailed above in Section I.A, and in Cablevision's initial comments, there is no basis for the Commission to subject terrestrially-delivered HD programming to the program access rules.[49] Congress expressly excluded terrestrial programming from the ambit of the program access rules, and cable operators are not under any sort of obligation to ensure that any or all programming which they develop is distributed via satellite or otherwise made subject to the strictures of section 628. Further, the D.C. Circuit has made clear that a valid business reason for a programmer's decision to utilize terrestrial delivery forecloses a finding of any evasion of the program access rules.[50]

There is no factual or legal basis for treating terrestrially-delivered HD programming as equivalent to the same or similar programming delivered in SD or analog signal, and therefore subject to the same requirements. The HD versions of Rainbow's programming, for example, are separately licensable, may be subject to different or additional carriage terms and conditions, may utilize different transmission and signal processing techniques, occupy their own distinct swath of bandwidth on the systems on which they are carried, are displayed on separate

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48/ Verizon Comments at 7.

49/ Cablevision Comments at 17-19.

50/ *EchoStar Communication Corp. v. FCC*, 292 F.3d 749, 755 (D.C. Cir. 2002).

channels, and in some instances offer different features and functionality -- which may include different content -- that can change over time.

Even if terrestrial HD programming were considered a "feed" of the same programming delivered by satellite rather than a distinct offering, the program access rules are inapplicable because such programming is not satellite delivered. The Commission has stated expressly that the program access rules do not apply to "programming that was 'previously' satellite-delivered, or the 'equivalent' of satellite cable programming, or programming that would qualify as satellite cable programming, but for its terrestrial delivery."[51/] Likewise, the fact that a programmer may have used satellite delivery for SD or analog programming offers no basis for imposing program access on a terrestrially-delivered HD version of that programming.[52/]

Noting that programming can now be delivered on a "cost-effective terrestrial basis solely for the purpose of circumventing the program access rules," Verizon argues that program access must be extended to terrestrial services in order to prevent cable from "removing the constraints" intended by Congress.[53/] In fact, however, both the Commission and the D.C. Circuit have found that the cost-effectiveness of terrestrial delivery "necessarily preclude[s] holding" that a violation or circumvention of the program access rules has occurred.[54/] Indeed, it is Verizon that seeks to "remov[e] the constraints" imposed by Congress by extending the reach of program access to programming excluded from the reach of section 628.

51/ *EchoStar 1999 Order* ¶ 21.

52/ *Id.* (noting that the statute defines "'satellite cable programming' as that which is transmitted via satellite," and that any prior satellite transmission is immaterial to the issue of whether programming sought in a program access complaint is subject to the requirements of section 628) (emphasis in original); *DirecTV, Inc. v. Comcast Corp.*, Memorandum Opinion and Order, 13 FCC Rcd. 21822, 21834, ¶ *25* (1998) (same).

53/ Verizon Comments at 13.

54/ *EchoStar Communication Corp. v. FCC*, 292 F.3d 749, 755 (D.C. Cir. 2002).

Verizon baldly asserts terrestrially-delivered HD programming "otherwise covered by the program access rules is critical to a video provider's ability to offer a viable competitive video offering," but offers no empirical evidence to support this view. Even without guaranteed access to all forms of HD programming, however, Verizon is deploying broadband network infrastructure to tens of millions of homes and, at least in those markets served by Cablevision, trumpeting the scope and speed of its video network build-out.[55/] As such, Verizon's argument cannot stand.

CONCLUSION

For the above reasons and those set forth in Cablevision's initial comments, the Commission should allow cable operators to seek relief from the exclusivity ban in competitive local markets and should not extend the program access rules to any programming that is not satellite-delivered.

Respectfully submitted,

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55/ *See* Cablevision Comments at 5-6; *New round begins in fight over choice*, BERGEN COUNTY RECORD, Jan. 15, 2007 (quoting Verizon official as saying "In two months we'll be serving more towns in New Jersey than Cablevision has in 35 years.").

CERTIFICATE OF SERVICE

I, Ernest C. Cooper, hereby certify that on this 12th day of February 2008, the foregoing Reply Comments of Cablevision Systems Corp. was filed electronically through the FCC's Electronic Comments Filing System (ECFS) and copies were served on the following as indicated:

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